IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATIONS NO. 7, 8 AND 9 OF 2007.

Shri Domnic Issac ,
Proprietor of M/s. Premier Builders,
Engineers & Contractors,
represented by Power of Attorney,
Shri Gurudas Bhandankar,
resident of St. Inez, Panaji,
Goa. .... Petitioner.

Versus

Union of India,
Through Central Public Works Department,
represented by the Executive Engineer,
Shri M.K. Tilak. .... Respondent.

Mr. Sudesh Usgaonkar with Ms. P. Kamat, Advocates for the Petitioner.

Mr. C.A. Ferreira, Assistant Solicitor General for the Respondent.

CORAM: S. A. BOBDE, J.

DATE: 14th JUNE, 2007.

ORAL ORDER:

The petitioner has applied for revision of the Order passed under Section 8 of the Arbitration and Conciliation Act, 1996 in a suit filed by the respondent/Union of India against the petitioner. Three suits have been filed against the petitioner. The three revision applications arise from an order passed in those suits. In each of the suits, the respective petitioner applied for an application under Section 8 of the Arbitration and Conciliation Act for a reference of the dispute to arbitration. The learned trial Court has declined to refer the dispute under Section 8 of the said Act to arbitration and has dismissed the applications of the petitioner. Hence these revision applications.

2. The decision on the issue turns on the said point in all the three revision applications. The suits have been filed by the respondent/Union of India, admittedly making a claim for compensation under clause 2 of the agreement between the parties.

Clause 2 reads as follows :-

> " If the contractor fails to maintain the required progress in terms of clause 5 or to complete the work and clear the site on or before the contract or extended date of completion, he shall, without prejudice to any other right or remedy available under the law to the Government on account of such breach, pay as agreed compensation the amount calculated at the rates stipulated below or such smaller amount as the Superintending Engineer (whose decision in writing shall be final and binding) may decide on the amount of tendered value of the work for every completed day/week (as applicable) that the progress remains below that specified in Clause 5 or that the work remains incomplete. This will also apply to items or group of items for which a separate period of completion has been specified.
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> i) Completion period (as originally stipulated not exceeding 3 months) @ 1% per day.
>
> ii) Completion period (as originally

stipulated exceeding 3 months)

@ 1% per week.

Provided always that the total amount of compensation for delay to be paid under this Condition shall not exceed 10% of the Tendered Value of work or of the Tendered Value of the item or group of items of work for which a separate period of completion is originally given.

The amount of compensation may be adjusted or set-off against any sum payable to the Contractor under this or any other contract with the Government. "

3. In other words, the Union of India has sued the petitioner for compensation under the aforesaid Clause 2.

4. In the application under Section 8, the petitioner's contention was that the dispute between the parties is covered by Clause 25 of the Agreement and is therefore governed by the arbitration clause. The learned trial Court has, after hearing the parties, come to the conclusion that the dispute is not capable of being referred to the Arbitrator and is a dispute arising under Clause 2 of the Agreement and, therefore, the dispute cannot be referred to an Arbitrator under Section 8 of the Act.

5. Having heard both the learned Counsel, there seems to be no reason to interfere with the Order of the trial Court. Admittedly, the dispute before the trial Court in the suit filed by the respondent/Union of India, is a dispute arising

under Clause 2 of the Agreement. Each of the claims in the suits is for compensation for delay in completion of the work and is squarely made under Clause 2 of the Agreement. This is apparent from a copy of the plaint.

6. The scheme of the Agreement in relation to claims is to be found in Clause 2, read with Clause 25, the latter providing for arbitration. Clause 25 begins with the words:- " Except where otherwise provided in the contract all questions and disputes ..... " and proceeds to provide for arbitration. It is thus clear that clause 25 provides for arbitration where there is no provision for the claim under any other part of the contract. Obviously, if there is such a provision, then Clause 25 would not be attracted. In the present case, the provision under which the claim for compensation is made by the Union of India, is under Clause 2 and, therefore, clearly the dispute is not susceptible to arbitration. In fact, the scheme of Clauses 2 and 25 has fallen for consideration in the case of ***Vishwanath Sood v. Union of India and another*** **(AIR 1989 S.C. 952).** There is admittedly no difference between Clause 2 and Clause 25 which fell for consideration before the Supreme Court and Clause 2 and Clause 25 in the present case. The Supreme Court held as follows :-

> " Firstly, the reference in the clause to the requirement that the work shall throughout the stipulated period of the contract be proceeded with due diligence and the reference in the latter part of the clause that the compensation has to be paid "in the event of the contractor failing to comply with " the prescribed time schedule make it clear that the levy of compensation is conditioned on some default or negligence on the part of the

contractor. Secondly, while the clause fixes the rate of compensation at 1 per cent for every day of default it takes care to prescribe the maximum compensation of 10 per cent on this ground and it also provides for a discretion to the Superintending Engineer to reduce the rate of penalty from 1 per cent. Though the clause does not specifically say so, it is clear that any moderation that may be done by the Superintending Engineer would depend upon the circumstances, the nature and period of default and the degree of negligence or default that could be attributed to the contractor. This means that the Superintending Engineer, in determining the rate of compensation chargeable, will have to go into all the aspects and determine whether there is any negligence on the part of the contractor or not. Where there has been no negligence on the part of the contractor or where on account of various extraneous circumstances referred to by the Division Bench such as vis major or default on the part of the Government or some other unexpected circumstance which does not justify penalising the contractor, the Superintending Engineer will be entitled and bound to reduce or even waive the compensation. It is true that the clause does not in terms provide for any notice to the contractor by the Superintending Engineer. But it will be appreciated that in practice the amount of compensation will be initially levied by the Engineer-in-charge and the Superintending Engineer comes into the picture only as some sort of revisional or appellate authority to whom the contractor appeals for redress. As we see it, clause 2 contains a complete machinery for determination of the compensation which can be claimed by the Government on the ground of delay on the part of the contractor in completing

> the contract as per the time schedule agreed to between the parties. The decision of the Superintending Engineer, it seems to us, is in the nature of a considered decision which he has to arrive at after considering the various mitigating circumstances that may be pleaded by the contractor or his plea that he is not liable to pay compensation at all under this clause. In our opinion the question regarding the amount of compensation leviable under clause 2 has to be decided only by the Superintending Engineer and no one else. "

7. The Supreme Court further observed that Clause 25 starts with an opening phrase excluding certain matters and disputes from arbitration and these are matters or disputes in respect of which provision has been made elsewhere or otherwise in the contract and came to the conclusion as follows :-

> " These words in our opinion can have reference only to provisions such as the one in paranthesis in clause 2 by which certain types of determination are left to the administrative authorities concerned. If that be not so, the words "except where otherwise provided in the contract" would become meaningless. We are therefore inclined to hold that the opening part of clause 25 clearly excludes matters like those mentioned in clause 2 in respect of which any dispute is left to be decided by a higher official of the Department. Our conclusion, therefore, is that the question of awarding compensation under clause 2 is outside the purview of the arbitrator and that the compensation, determined under clause 2 either by the Engineer-in-charge or on further reference by the

> Superintending Engineer will not be capable of being called in question before the arbitrator. "

In this view of the matter, I have no hesitation in upholding the order of the Trial Court.

8. Mr. Usgaonkar, the learned Counsel for the petitioner however submitted that the question whether the matter is capable for arbitration or not, will be a matter which will have to be decided by the Arbitrator and ought not to have been decided by the Civil Court. There is no merit in this contention, in view of the fact that the petitioner themselves moved an application under Section 8 and applied for non-suiting the respondent under Section 8 of the Act. It can hardly be said that such an issue, when raised by one of the parties under Section 8, will itself have to be filed by the Arbitrator. I see no merit in this contention or the reliance placed on the judgment of the Supreme Court in ***Hindustan Petroleum Corpn. Ltd. v. M/s. Pinkcity Midway Petroleums (*****AIR 2003 S.C. 2881).**

9. In the result, there is no merit in the revisions which are hereby dismissed.

S. A. BOBDE, J.

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